Supreme Court, U.S.
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In the

SUPREME COURT OF UNITED STATES

OCTOBER TERM, 2000

Anderson Hawkins, *Petitioner*

v.

C. Martin Lensing, in his capacity as Warden of Hunt Correctional Center, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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3 pp

QUESTION PRESENTED FOR REVIEW

Whether petitioner was constructively denied effective assistance of counsel, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, where appellate counsel failed to submit to the State Court of Appeal a competent legal brief setting out the facts of the case, the applicable law and any argument on behalf of petitioner.

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 2000

ANDERSON HAWKINS,

Petitioner,

v.

MARTIN LENSING, in his capacity as Warden of Hunt Correctional Center, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Anderson Hawkins respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1-B) and the opinion of the district court (App., infra, 1-A) are unreported.

JURISDICTION

The court of appeals entered its judgment on July 7, 2000. The jurisdiction of this Court is invoked under 28

U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States of America provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fifth Amendment is enforced upon the individual States through the Fourteenth Amendment to the Constitution of the United States of America.

The Anti-terrorism and Effective Death Penalty Act, effective April 24, 1996, amended 28 U.S.C. δ 2254(d) to provide that:

> (d) An application for a writ of habeas corpus

> on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

A. FACTS

On June 1, 1992, Anderson Hawkins, hereinafter petitioner, made the worst mistake of his life when he fired a bullet that killed his wife's lover. Overcome by jealousy, anger and frustration, petitioner (who had no prior record of any kind) sought out Leon Jackson, Sr., in an effort to scare him away from petitioner's wife. This attempt to scare his wife's lover would turn tragic.

Petitioner and Joyce Hawkins had been married 17 years, but were living apart in the Spring of 1992 However, on June 1, 1992, petitioner and his wife were planning to move back in together. Late on the evening of May 31, 1992, petitioner was in Baton Rouge packing his car for the move the next day back to Jackson, Louisiana and his wife. At 10:00 or 10:30 p.m., petitioner attempted

to locate his wife by telephone but could not. Petitioner left Baton Rouge and headed to Jackson. Louisiana to "get lined up for the following day." When petitioner arrived at the house on Highway 10, he still could not locate his wife. Suspecting his wife was with her lover, petitioner went looking for her. For forty minutes to an hour, petitioner drove around to several locations looking for his wife's car. During this time, petitioner's suspicions and frustration grew as he continued to search for the woman he loved and who he believed he would be reunited with in marriage the next day.

Finally, petitioner returned to his house to again look for his wife, but she was not there. Again, petitioner went out to look for his wife. This time however, he saw her car on Highway 10 as he drove away from the victim's house. Petitioner did not stop to talk to her, but instead went to the south side of the house where he could not be seen. Petitioner believed there would be greater effect if Mr. Jackson did not know who shot over his head.

Shaking and scared, petitioner watched as the lights to the house came on and Mr. Jackson came to the door. Petitioner fired one shot from his rifle that struck the side of the house and the storm door. Most of the bullet traveled up the street after striking the house. Tragically, a small portion of the projectile fragmented and struck Mr. Jackson in the left side of the chest and lacerated a small portion of the aorta, which caused Mr. Jackson to hemorrhage internally and die.

After firing that one shot, petitioner got in his car and went to his brother-in-law's house and gave him the

gun and the shells and asked him to keep it for him. After telling his brother-in-law that the gun was loaded and to be careful, petitioner left. Petitioner's brother-in-law later testified at trial that Joyce Hawkins and the victim, Leon Jackson, were having an affair. After leaving his brother-in-law's house, petitioner drove to his brother's house in Baton Rouge. Chester Hawkins testified that during the early morning hours of June 1, 1992, petitioner came to his apartment and said that he [Anderson Hawkins] "might have done something bad." Chester Hawkins also testified that Joyce Hawkins was having an affair with Leon Jackson.

The East Feliciana Parish Sheriff's Office responded to the reports of a gunshot in the area and discovered Leon Jackson in the doorway of his house. Within hours of the shooting, petitioner was arrested and charged with the murder of Leon Jackson.

B. PROCEEDINGS BELOW

On June 23, 1992, the Grand Jury for East Feliciana Parish returned an indictment against petitioner, charging him with the second degree murder of Leon Jackson, Sr. On July 6, 1992, petitioner appeared before the Honorable William Klein for arraignment. Judge Klein appointed Richard Howell to represent petitioner and formally arraigned him for second degree murder. Petitioner entered a plea of not guilty.

On January 19, 1993, petitioner was tried before a twelve member jury for second degree murder. The trial took one day and the jury returned a verdict of guilty as charged. On February 1, 1993, petitioner appeared before

Judge Klein for sentencing. Prior to sentencing, petitioner's attorney filed a "Motion for New Trial" and a "Motion for Post Verdict Judgment of Acquittal." Both motions were denied. The Court then sentenced petitioner to life imprisonment in the custody of the Louisiana Department of Corrections at hard labor without benefit of parole, probation or suspension of sentence. Counsel for petitioner gave oral notice of appeal immediately after sentencing.

Petitioner's appointed trial counsel also represented him on appeal. On March 11, 1994, petitioner's counsel filed a seven page "brief" with the First Circuit Court of Appeal for the State of Louisiana. Counsel's brief raised two issues: insufficient evidence to convict petitioner and the failure to grant a mistrial when petitioner appeared before the jury in handcuffs. On the first issue, counsel only provided two pages of black letter law and argued no facts specific to petitioner's case. Counsel merely stated there was insufficient evidence to convict petitioner and offered nothing more in support of this claim. Further, counsel never requested oral argument, which is routinely granted by the First Circuit.

On March 11, 1994, the First Circuit affirmed petitioner's conviction. *State v. Hawkins*, 93-0615 (La. App. 1 Cir. 3/11/94), 636 So.2d 639.

In 1995, petitioner filed a *pro se* application for post conviction relief in district court for the Parish of East Feliciana, alleging insufficient evidence to support his conviction. On July 19, 1995, Judge Klein denied petitioner's petition without a hearing. No writ application was attempted from this decision.

On March 11, 1997, petitioner, through undersigned counsel, filed a second application for post conviction relief in the 20TH Judicial District Court, alleging ineffective assistance of counsel on appeal.

The trial court denied the petitioner's application on July 28, 1997. The Louisiana First Circuit Court of Appeal denied relief without opinion. *Anderson Hawkins v. State of Louisiana*, 97-2910 (La. App. 1 Cir. 2/6/98). The Louisiana Supreme Court denied writs. *State of Louisiana, ex rel. Anderson Hawkins v. State of Louisiana*, 98-0605 (La. 9/18/98), 724 So.2d 203 (La. 1998), *reconsideration denied*, 724 So.2d 756 (La. 1998).

On July 2, 1999, petitioner filed a petition for Writ of Habeas Corpus under 28 U.S.C. § 2254.

On October 19, 1999, U.S. Magistrate Stephen Riedlinger filed his report and recommendations into the record. (App. 6-A).

On January 7, 2000, U.S. District Judge Ralph Tyson adopted the magistrate's report and dismissed petitioner's complaint. (App. 1-A). The District Court also denied a "certificate of appealability." (App. 12-A).

On March 31, 2000, the U.S. Fifth Circuit Court of Appeals ordered petitioner to file an application for a "certificate of appealability" pursuant to the "Antiterrorism and Effective Death Penalty Act of 1996." (App. 1-B).

On July 7, 2000, the U.S. Fifth Circuit Court of

Appeals denied petitioner's application for a "certificate of appealability." (App. 3-B).

REASONS FOR GRANTING THE PETITION

It is respectfully submitted that the role of trial counsel and appellate counsel are separate and unique to the criminal justice system and require a different standard for reviewing claims of ineffective assistance of counsel.

In *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985), this Court held that there is a constitutional right to effective assistance of counsel on appeal in criminal cases. That right arises out of the due process clause of the Fifth Amendment to the United States Constitution.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court articulated a two-part standard for evaluating a criminal defendant's Sixth Amendment claim of ineffective assistance of trial counsel.

Petitioner asserts that he was denied effective assistance of counsel on appeal where counsel merely stated to the court, in a brief riddled with typographical and factual errors, that there was insufficient evidence to convict the petitioner and left the analysis of the evidence to the court of appeal. This alone mandates relief. It is petitioner's position that the lower courts erred in applying the *Strickland* analysis to petitioner's claim of ineffective assistance of appellate counsel.

This Honorable Court has not yet determined the standard for evaluating claims of ineffective assistance of

appellate counsel. Every United States Circuit Court of Appeals has applied the *Strickland* test to appellate counsel. Petitioner asserts that a different standard from *Strickland* must be adopted because of the significant differences between trial and appellate counsel.

It is respectfully submitted that the central issue in the case at bar is the "brief" filed on petitioner's behalf in his direct appeal to the First Circuit Court of Appeal for the State of Louisiana. Thus, the "brief" should be examined carefully.

The "brief" filed on petitioner's behalf is all of seven pages long. Page 1 of the "brief" is labeled "Syllabus" and consists of nine single-spaced paragraphs. These paragraphs provide generalized statements of law on sufficiency of the evidence and the propriety of a defendant appearing shackled before the jury.

On page two, the "Statement of the Case" is presented by appellate counsel in one paragraph. In three sentences, the only facts presented to the Court are the fact that petitioner was charged with second degree murder, was convicted of second degree murder and was sentenced to life.

On the same page, appellate counsel provides the "Jurisdictional Statement" and then the "Issues Presented." Issue one is as follows:

> 1. Did the evidence presented by the State of Louisiana sufficiently prove each and every element of the crime of **simple escape** such

as to warrant a conviction of the defendant? (Emphasis added).

Petitioner, of course, was never charged with the crime of simple escape. Appellate counsel then presents his "Argument" on behalf of petitioner:

> 1. After viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found each element of the crime of **simple escape** beyond a reasonable doubt. (Emphasis added).

Appellate counsel then presents an "argument" consisting of two pages of the black-letter law on sufficiency of the evidence. Not one fact from the trial record is mentioned in this presentation. Counsel wholly fails to argue with any specificity and offers no analysis of the law as it applies to the facts of the case at bar.

The argument involving "issue" two begins at the bottom of page four. On this issue, counsel actually cites specific facts from the case at bar and argues that a mistrial should have been granted when the jury viewed the defendant in handcuffs before the start of trial.

On page six, appellate counsel presents his conclusion, which includes the following:

> The State has not presented sufficient evidence to enable a rational trier of fact to find that the defendant committed the

> essential elements of the crime of **simple escape**, after viewing the evidence in the light most favorable to the prosecution. This Court should therefore order the entry of a Judgment of Acquittal. (Emphasis added).

The final page of the "brief" consists of counsel's signature and the "Certificate of Service."

It is respectfully submitted that the "brief" filed on behalf of petitioner constructively denied him effective assistance of counsel on appeal.

A criminal defendant has a constitutional right to effective assistance of counsel in his first appeal as of right. *Evitts v. Lucey*, 469 U.S. at 393-95, 105 S.Ct. at 834. In *Penson v. Ohio*, 488 U.S. 75, 109 S.Ct. 346 (1988), this Court declined to apply the *Strickland* requirement of prejudice analysis where an attorney withdrew from representation without filing a sufficient brief as required by *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967). In *Penson*, the Court stated that "[m]ere speculation that counsel would not have made a difference is no substitute for actual appellate advocacy, particularly when the court's speculation is unguided by the adversary process." *Penson*, 469 U.S. at 87.

In the case at bar, the analysis of the evidence and its sufficiency is left entirely to the court of appeal as were the issues in *Penson*. It cannot be considered advocacy on petitioner's behalf for counsel to merely raise the issue of insufficient evidence without any argument

In *Anders*, this Court recognized that counsel could withdraw from representation without denying an appellant fair representation only where certain safeguards were followed. That is, counsel must conduct a "conscientious examination" of the case before seeking permission to withdraw. That request must be accompanied by a brief to the appellate court "referring to anything in the record that might arguably support the appeal." The appellate court must then conduct a "full examination of all the proceedings to decide whether the case is wholly frivolous." *Anders*, 386 U.S. at 744, 87 S.Ct. at 1400. If appellate counsel in the case at bar felt that there were no facts to support his argument, then he should have followed the mandates of *Anders*.

In *Lofton v. Whitley*, *905* F.2d 885 (5th Cir. 1990), the U.S. Fifth Circuit held that a defendant is constructively denied effective assistance of counsel where counsel on direct appeal filed a brief asserting no grounds for appeal and requesting only a review of the record for patent errors. The "brief" filed in the case at bar on behalf of petitioner is no better than the "errors patent brief" submitted in *Lofton* and fails to follow the safeguards of *Anders*.

The "brief" in the case at bar is void of any advocacy on behalf of petitioner. The "brief" fails to set out the facts of the case, provides "black letter" law on the issue of sufficiency of the evidence and wholly fails to apply the law to the facts of the case. It is respectfully submitted that there is every reason to believe that the "brief" is nothing more than a form used over and over by counsel. This assertion is supported by the fact that counsel refers to the charge of simple escape instead of second

degree murder throughout the "brief" and there is only a passing reference to the case at bar.

It is respectfully submitted that every appellate lawyer must at a minimum: (1) secure and read essential portions of the record; (2) accurately set out the facts with supporting citations to the record; (3) research the applicable law; (4) use relevant and persuasive authority; (5) select strategically among the issues presented, considering the strength of authority, the facts, and the standard and scope of review; and (6) apply the law to the facts of the case. Griffin, *The Right to Effective Assistance of Appellate Counsel*, 97 W. Va. L. Rev. 1 (1994). Appellate counsel in the case at bar failed to satisfy the basic requirements of an appellate brief and constructively denied petitioner the right to effective assistance of counsel on appeal.

Professor Griffin goes on to argue that the remedy for ineffective assistance of counsel on appeal is far less dramatic than the remedy for ineffective assistance of trial counsel where the remedy is reversing a conviction and ordering a new trial. Ineffective assistance of appellate counsel merely allows a defendant the right to submit an out of time appeal to the state appellate court. Professor Griffin also analyzes the unique and distinct role played by appellate counsel and trial counsel and suggests adopting a different approach to ineffective assistance of appellate counsel.

Finally, once it is determined that a defendant has been constructively denied appellate counsel "any discussion even flirting with the language of *Strickland's*

prejudice or harmless error analysis is unnecessary." *See Hughes v. Booker*, 220 F.3d 346, 352 (5th Cir. 2000), citing *Lombard v. Lynaugh*, 868 F. 2d *1475*, 1487 *(5th* Cir. 1989).

The District Court's denial of relief based on *Strickland v. Washington* is in error and should be reversed.

In reviewing a district court's grant or denial of habeas relief, the Court should review factual findings for clear error and issues of *law de novo. See Dison v. Whitley*, 20 F. 3d 185, 186 (5th Cir. 1994). Mixed questions of law and fact are reviewed *de novo* by independently applying the law to the facts found by the district court, unless those factual determinations are clearly erroneous. *See Gray v.Lynn*, 6 F.3d 265, 266 (5th Cir. 1993).

In his habeas application, petitioner asserted a single ground for relief: his counsel rendered ineffective assistance of counsel on appeal.

The Anti-terrorism and Effective Death Penalty Act, effective April 24, 1996, amended 28 U.S.C. δ 2254(d) to provide that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal

> law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Amended section 2254(e)(1) provides as follows:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a Factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Subsection (d)(1) of section 2254 applies to a State court's factual determination. It bars federal court relief unless the State court adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence."

The second clause of subsection (d)(1) refers to mixed questions of law and fact because it speaks of an "unreasonable application of clearly established Federal law." When the issue before the court is a mixed question of law and fact, the court may grant relief only if it determines that the State court decision rested on "an unreasonable application of clearly established Federal law, as determined by the Supreme Court," to the facts of the

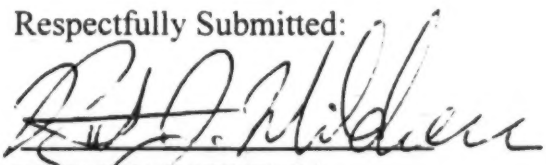
case. The first clause of subsection (d)(1) refers to questions of law. When the issue raised involves a purely legal question, the court may grant relief only if it determines that the State court's decision rested on a legal determination that was "contrary to...clearly established Federal law as determined by the Supreme Court."

CONCLUSION

Petitioner was constructively denied assistance of counsel on appeal where appellate counsel filed a brief alleging insufficient evidence without any supporting facts or argument.

Such a brief is no better than a patent error brief and mandates relief.

Respectfully Submitted:



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APPENDIX A

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ANDERSON HAWKINS, JR.	CIVIL ACTION
VERSUS	NO. 99-548-C
C. MARTIN LENSING, ET AL	

JUDGMENT

For the written reasons assigned and filed herein:

IT IS ORDERED ADJUDGED AND DECREED that the application for writ of habeas corpus filed on behalf of petitioner is hereby DISMISSED.

IT IS FURTHER ORDERED that upon the finality of these proceedings, the clerk is hereby instructed to return all copies of state court records filed herein.

Baton Rouge, Louisiana, January 7, 2000.

/s/ RALPH E. TYSON
RALPH E. TYSON
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ANDERSON HAWKINS, JR.	CIVIL ACTION NO.
VERSUS	99-548-C
C. MARTIN LENSING, ET AL	

RULING ON APPLICATION
FOR WRIT OF HABEAS CORPUS

The court has carefully considered the petition, the record, the law applicable to this action, and the Report and Recommendation of United States Magistrate Judge Stephen C. Riedlinger dated October 15, 1999. Petitioner has filed an objection which the court has considered.

The court hereby approves the report and recommendation of the magistrate judge and adopts it as the court's opinion herein.

Accordingly, plaintiffs application for a writ of habeas corpus will be dismissed.

Judgment to be entered accordingly.

Baton Rouge, Louisiana, January 7 , 2000.

/s/ RALPH E. TYSON
RALPH E. TYSON
UNITED STATES DISTRICT JUDGE
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U.S. DIST. COURT

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by DEPUTY CLERK

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ANDERSON HAWKINS, JR.	CIVIL ACTION NO.
VERSUS	99-548-C-1
C. MARTIN LENSING, ET AL	

NOTICE

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the U. S. District Court.

In accordance with 28 U.S.C. §636(b) (1), you have ten days after being served with the attached report to file written objections to the proposed findings of fact, conclusions of law, and recommendations set forth therein. Failure to file written objections to the proposed findings, conclusions and recommendations within ten days after being served will bar you, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed findings and legal conclusions accepted by the District Court.

ABSOLUTELY NO EXTENSIONS OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.

Baton Rouge, Louisiana, October 15, 1999.

/s/ STEPHEN REIDLINGER

UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ANDERSON HAWKINS JR.

VERSUS CIVIL ACTION

C. MARTIN LENSING, ET AL NUMBER 99-548-C-1

MAGISTRATE JUDGE'S REPORT

This matter is before the court on the application of Anderson Hawkins Jr. (#321126) for a writ of habeas corpus pursuant to 28 U.S.C. §2254.

Petitioner Anderson Hawkins Jr. was convicted on February 1, 1993 of one count second degree murder by a jury in the Twentieth Judicial District Court, East Feliciana Parish, Louisiana. Petitioner received a life sentence at hard labor without benefit of parole, probation, or suspension of sentence. Petitioner's conviction and sentence were subsequently affirmed by the First Circuit Court of Appeal. State of Louisiana v. Hawkins, 93-0615 (La. App. 1st Cir. 3/11/94), 636 So.2d 639. Petitioner did not seek supervisory review by the Louisiana Supreme Court.

On March 11, 1997, the petitioner filed an application for post-conviction relief in the trial court asserting three claims:

(1) he received ineffective assistance of counsel on appeal; (2) the state's crime scene reconstruction expert made a prejudicial statement rendering the trial unfair; and, (3) there was insufficient evidence to support his

conviction. Petitioner's post-conviction relief application was initially denied by the trial court on the ground that it was untimely. The court specifically relied on La. C.Cr.P. 930.8. Petitioner filed a motion for reconsideration. The trial court vacated its order denying the petitioner's post-conviction relief application and scheduled an evidentiary hearing on the petitioner's application. The trial court denied the petitioner's application on July 28, 1997[1]. The Louisiana First Circuit Court of Appeal and the Louisiana Supreme Court denied review. State of Louisiana. ex rel., Anderson Hawkins v.State of Louisiana, 97-2710 (La. App. 1st Cir., February 6, 1998); State of Louisiana ex rel. Anderson Hawkins v. State of Louisiana, 98-0605 (La., September 18, 1998).

In this court, the petitioner asserted a single ground for relief: his counsel rendered ineffective assistance of counsel on appeal.

No evidentiary hearing is required. Petitioner has exhausted his state court remedies.

The Anti-Terrorism and Effective Death Penalty Act, effective April 24, 1996, amended 28 U.S.C. § 2254(d) to provide that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
> (1) resulted in a decision that was

[1] The minute entry for this hearing did not indicate that the court denied relief again based on any procedural defect.

> contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> Amended section 2254(e) (1) provides as follows:
> (e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Subsection (d) (2) of section 2254 applies to a state court's factual determination. It bars federal court relief unless the state court adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence." Subsection (d) (1) provides the standard of review for questions of law and mixed questions of law and fact. *Drinkyard v. Johnson*, 97 F.3d 751, 767-68 (5th Cir. 1996), cert. Denied, __ U.S. __, 117 S.Ct. 1114 (1997).

The second clause of subsection (d) (1) refers to mixed questions of law and fact because it speaks of an "unreasonable application of [ ] clearly established Federal law." When the issue before the court is a mixed question

of law and fact, the court may grant relief only if it determines that the state court decision rested on "an unreasonable application of [ ] clearly established Federal law, as determined by the Supreme Court," to the facts of the case. The first clause of subsection (d) (1) refers to questions of law. When the issue raised involves a purely legal question, the court may grant relief only if it determines that a state court's decision rested on a legal determination that was "contrary to... clearly established Federal law, as determined by the Supreme Court." Id.

Petitioner's claim of ineffective assistance of counsel on appeal has no merit.

To obtain habeas relief based upon a claim of ineffective assistance of counsel, the petitioner must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). To prove deficient performance the petitioner must demonstrate that counsel's actions "fell below an objective standard of reasonableness." JA~.. at 688, 104 S.Ct. at 2064. To prove prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," id., at 694, 104 S.Ct. at 2068, and that "counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 844 (1983).

Petitioner asserted that his trial counsel was ineffective when he: (1) failed to adequately brief the petitioner's insufficient evidence claim on appeal; and, (2) failed to seek supervisory writs of review to the Louisiana

Supreme Court.

A defendant has a right to effective assistance of counsel on his first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985) . The failure to brief what ultimately is a meritless issue does not constitute ineffective assistance of counsel. Mendiola v. Estelle, 635 F.2d 487 (5th Cir. 1981); United *States* v. Broussard, 645 F.2d 504 (5th Cir. 1981)

The primary claim raised on direct appeal was that there was insufficient evidence to support the petitioner's second degree murder conviction.

The First Circuit Court of Appeal conducted a thorough review of the evidence and made the following factual findings:

> In the instant case, defendant left Baton Rouge and drove to East Feliciana Parish armed with a 30.06 bolt action rifle. When the victim came to the door, defendant shot him. After the shooting, defendant saw the victim fall and made no attempt to help the victim. We find that a rational trier of fact could conclude that defendant did have the specific intent to kill or inflict great bodily harm to the victim.

State of Louisiana v. Hawkins, 93-0615 (La. App. 1st Cir. 3/11/94), 636 So.2d 639.

Even assuming that the appellate brief filed by counsel was deficient[2], the petitioner has not shown that

[2] This is a generous and perhaps unwarranted assumption since the petitioner offered no suggestion as to what arguments his appellate

there is any reasonable probability that, had his attorney fully briefed the insufficient evidence claim, the outcome of his appeal would have been any different. As noted above, the appellate court reviewed the record and found that there was sufficient evidence to support the petitioner's conviction. Considering the First Circuit's factual findings, which are amply supported by the evidence introduced at trial, the petitioner's ineffective assistance of counsel claim is without merit.

As to his claim of ineffectiveness based on counsel's failure to file supervisory writs to the Louisiana Supreme Court, the claim is without merit. The Due Process Clause does not require that a state provide an indigent defendant, who has appealed as of right to the state intermediate appellate court, with counsel on his discretionary appeal to the State Supreme Court. Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437 (1974); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963).

RECOMMENDATION

It is the recommendation of the magistrate judge that the petitioner's application for a writ of habeas corpus be denied.

Baton Rouge, Louisiana, October 15, 1999.

/s/ STEPHEN REIDLINGER
UNITED STATES MAGISTRATE JUDGE

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counsel should or could have made, nor how such arguments would have had any affect on his appeal.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ANDERSON HAWKINS, JR.

VERSUS CIVIL ACTION

C. MARTIN LENSING, ET AL NUMBER 99-58-C-1

CERTIFICATE OF APPEALABILITY

A Notice of Appeal having been filed in the above captioned case in which detention complained of arises out of process issued by a State court, or the final order in a proceedings under § 2255, the court having considered the record in the case and the requirements of 28 U.S.C. § 2253 and Rule 22(b), Federal Rules of Appellate Procedure, hereby finds that:

_____ a substantial showing of the denial of a constitutional right on the issue(s) stated below has been made, petitioner's motion for certificate of appealability is **GRANTED**.

__X__ a substantial showing of the denial of a constitutional right has not been made, petitioner's motion for certificate of appealability is **DENIED** for the reasons set forth in the magistrate judge's report and recommendation.

Baton Rouge, Louisiana, March 28, 2000.

/s/ RALPH TYSON
UNITED STATES DISTRICT JUDGE

DKT. & ENTERED

DATE 3-29-00
NOTICE MAILED TO:

USCA
RET. SER
HILDUM
MEANS
DC.M

DATE 3-92 BY K.

APPENDIX B

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III **TEL. 504-589-6514**
CLERK **600 CAMP STREET**

NEW ORLEANS, LA 70130

March 31, 2000

Mr Robert J Hildum
Manasseh, Hildum & Gill
900 N Boulevard
Baton Rouge, LA 70802

No. 00-30139 Hawkins v. Lensing

USDC No. 99-CV-548

Before the appeal referenced above can proceed you must file an application requesting a "certificate of appealability." Doing so will comply with the amendments to title 28 U.S.C. contained in the "Antiterrorism and Effective Death Penalty Act of 1996" signed into law on April 24, 1996. As such, if you wish to proceed with the appeal, address your application for "certificate of appealability" to this court along with a brief in support setting forth the issues with specificity, supporting arguments and appropriate record citations. Four legible copies must be filed within 40 days from the date above. Failure to do so will result in a 5THCIR.R. 42 dismissal.

By copy of this letter, counsel for respondent-appellee is advised that a response to the application and brief is not

required.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Claudia Farrington, Deputy Clerk

Claudia Farrington, Deputy Clerk

cc: Mr Jesse L Means Jr

IN THE UNITED STATE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-30139
USDC No. 99-CV-548

ANDERSON HAWKINS, JR.,

Petitioner-Appellant,

versus

C. MARTIN LENSING, Warden, Hunt Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana

O R D E R:

Anderson Hawkins, Jr., Louisiana prisoner #32116, seeks a certificate of appealability (COA) to appeal from the dismissal of his habeas corpus application. Hawkins contends that he received ineffective assistance of appellate counsel, contending that counsel was ineffective for failing to present an acceptable appellate brief and failing to make a proper argument that the evidence was insufficient to support his conviction.

A COA may issue "if the applicant has made a

substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (b)(2). Hawkins has made no such showing; accordingly, his COA motion is DENIED.

/s/ JACQUES L. WIENER, JR.
JACQUES L. WIENER, JR.

UNITED STATE CIRCUIT JUDGE
U.S. COURT OF APPEALS
FILED
JUL 7 2000
CHARLES R. FULBRUGE III
CLERK